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Severson v. State Appellant's Brief Dckt. 40769

IN THE SUPREME COURT OF THE STATE OF IDAHO

LARRY SEVERSON, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 40769 D.Ct. No. CV-2009-1408 (Elmore County)

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Elmore

HONORABLE LYNN NORTON
Presiding Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the denial of Appellant Larry Severson's petition for post-conviction relief. R 239-241. Relief should be granted because the claim of ineffective assistance of counsel in failing to object to prosecutorial misconduct in closing arguments raised a genuine issue of material fact both as to deficient performance and as to prejudice and should not have been summarily dismissed.

B. Procedural History and Statement of Facts

The State charged Mr. Severson with poisoning his wife by tampering with her Hydroxycut capsules, inserting Drano into the capsules, and first degree murder - either by causing Mrs. Severson to overdose on Ambien and Unisom or by suffocating her with his hand. Trial R Vol. 3, p. 377-378.[1]

The case proceeded to trial. The State could not present evidence of a definitive cause of death; rather its forensic pathologist concluded that the cause of death was undetermined, and the jury was not asked to return a verdict unanimously agreeing to a means of death. Trial Tr. Vol. 2, p. 1250, ln. 9-10; p. 1318, ln. 13-17; *State v. Severson,* 147 Idaho 694, 701, 215 P.3d 414, 422 (2009). Following seventeen days of evidence and testimony, the jury returned a verdict of guilty of poisoning and a general verdict of murder. *State v. Severson, supra.* The district court sentenced Mr. Severson to a term of fixed life. Trial R Vol. 10, pp. 1908-1911. He appealed and

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[1] The district court took judicial notice of the clerk's record, transcripts, and exhibits from the underlying criminal trial in the post-conviction case. R 87. Mr. Severson has filed a motion to augment the record in this appeal with the records from the underlying criminal case. See Appellant's Motion to Augment filed contemporaneously with this brief.

the Supreme Court, with Justice W. Jones and Justice *pro tem* Kidwell dissenting, affirmed the convictions. *State v. Severson, supra.* The dissent was from the majority's determination that prosecutorial misconduct in closing argument was not fundamental reversible error. Ineffective assistance of counsel was not presented as an issue on appeal. *Id.*

Mr. Severson then filed a *pro se* petition for post-conviction relief raising several claims. R 4-18. Relevant to this appeal, Mr. Severson alleged that trial counsel was ineffective in failing to object to prosecutorial misconduct at trial. R 7 and 12.

The district court entered a notice of intent of partial summary dismissal and an order appointing counsel. R 19-27.

Appointed counsel filed an amended petition. R 52-62. That petition raised three causes of action including that Mr. Severson was denied effective assistance of counsel in violation of the Sixth Amendment due to counsels' failure to object to improper comments by the State in closing. R 60-62. The amended petition was accompanied by Mr. Severson's request that the court take judicial notice of the record in the underlying case. Augmented Record, Petitioner's Request that the Court Take Judicial Notice, filed April 18, 2011, and Filing and Notice of Filing of Judicially Noticed Material, filed April 18, 2011.

The State filed an answer. R 67-85.

Thereafter, the district court entered an order holding that the amended petition was timely and taking judicial notice of the material referenced in Mr. Severson's motion for judicial notice. R 86-89.

Mr. Severson's claim of ineffective assistance of counsel in not objecting to prosecutorial misconduct in closing was set out in the amended petition:

> Severson submits the Justice W. Jones dissent and Justice Pro Tem Kidwell's concurrence in the dissent to establish that Severson received ineffective assistance of counsel due to counsel's failure to object in the state's closing arguments.

R 61.

The State moved for summary dismissal of this claim arguing, "Severson has failed to meet his burden of establishing a *prima facie* case of deficient performance, much less prejudice." The State further argued that the question of prejudice was decided against Mr. Severson in the direct appeal and therefore was *res judicata.* Augmented Record, Brief in Support of Respondent's Motion for Partial Summary Dismissal, filed February 13, 2012, p. 41-43.

In response, Mr. Severson argued that the opinions of the majority and the dissent in the direct appeal established that the prosecutorial misconduct occurred but that it could only be reviewed for fundamental error - a less rigorous standard than if counsel had objected below. He argued that the failure to object was deficient performance and was prejudicial. R 100-101.

The State later filed a second motion for summary dismissal. R 112-113. And, again, the State argued that the claim of ineffective assistance of counsel for failing to object to prosecutorial misconduct during closing arguments should be dismissed. Augmented Record, Brief in Support of Respondent's Second Motion for Partial Summary Dismissal, filed June 8, 2012, pp. 13-14.

Thereafter, the district court granted the State's motion. The district court dismissed the claim of ineffective assistance in failing to object to misconduct during closing arguments with the following analysis:

6. Failure to Object to State's Closing Argument

> [P]aragraph 64 of the verified amended petition also alleges that Justice Jones's dissent and Justice Pro Tem Kidwell's concurrence in the dissent establish ineffective assistance of counsel due to counsel's failure to object to the state's closing argument. This issue is not addressed in affidavits or detailed in the response brief and the amended petition only mentions the dissenting opinion and the concurrence in the dissent as basis for an allegation in this action.
>
> Severson's first affidavit states that 'During trial petitioner's court appointed attorney failed to object to improper, prejudicial, and inflammatory remarks and statements by the Prosecutor' and cites the dissent in the direct appeal as its basis. (Severson Aff., Oct. 13, 2009, p. 3). Severson specifically identified prosecutor's comments alleged as error in the direct appeal and the Idaho Supreme Court found that most were not improper but found 'the single, isolated [improper] comment made during the course of a seventeen-day trial, [where] there was substantial evidence of Severson's guilt' was not prejudicial. *Severson,* 147 Idaho at 719, 215 P.3d at 439. The Supreme Court's finding that there was no fundamental error in the comments will not be relitigated here. When legal issues are decided in a criminal action on direct appeal, the defendant is barred by the doctrine of *res judicata* from raising them again in a post-conviction relief proceeding. *State v. Creech,* 132 Idaho 1, 10, 966 P.2d 1, 10 (1998) (citing *State v. Beam,* 115 Idaho 231, 233, 766 P.2d 701, 703 (1998)).

R 144.

All of Mr. Severson's remaining claims were denied, either summarily or after an evidentiary hearing. R 114-148, 151-160, 211-236. A final judgment was entered. R 237-238. And, this appeal timely followed. R 239-241.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in summarily denying the claim of ineffective assistance of counsel in not objecting to prosecutorial misconduct at trial based upon the doctrine of *res judicata* when the issue before the Idaho Supreme Court in direct appeal was whether the prosecutorial misconduct was fundamental error and the claim in post-conviction was ineffective

assistance of counsel which is controlled by the *Strickland*[2] analysis of whether defense counsel's performance was deficient and if so whether the deficiency was prejudicial?

2. Did Mr. Severson raise a genuine issue of material fact as to whether he was denied effective assistance of counsel by counsels' failure to object to prosecutorial misconduct in the State's closing arguments?

IV. ARGUMENT

A. The District Court Erred in Summarily Dismissing Mr. Severson's Ineffective Assistance of Counsel Claim on the Basis of *Res Judicata.* Furthermore, Mr. Severson Did Raise a Genuine Issue of Material Fact Regarding Ineffective Assistance of Counsel

1. *Standard of review*

> [I]f the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may not be summarily dismissed. If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues.
>
> On appeal from an order of summary dismissal [of a petition for post-conviction relief], we apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. Over questions of law, we exercise free review.
>
> To prevail on an ineffective assistance of counsel claim, the defendant must show that his attorney's performance was deficient and that the defendant was prejudiced by the deficiency. To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceeding would have been different.

Schultz v. State, 153 Idaho 791, 797, 291 P.3d 474, 480 (Ct. App. 2012) (citations omitted).

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[2] *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

2. *Argument*

Mr. Severson asserted facts, which if true, would entitle him to post-conviction relief. Specifically, he alleged that trial counsel rendered deficient performance in not objecting to prosecutorial misconduct during the State's closing argument and that this failure to object was prejudicial. He supported this claim with the Supreme Court's opinion in his direct appeal, an opinion which included the dissent of two justices who would have found that prosecutorial misconduct denied Mr. Severson a fair trial. The dissenting opinion provided evidence to raise a genuine issue of material fact as to whether trial counsel was ineffective in not objecting to prosecutorial misconduct and as to whether that deficiency was prejudicial. Therefore, the order summarily dismissing his claim should be reversed and the matter remanded for further proceedings. *Id.*

The district court did not consider whether Mr. Severson raised a genuine issue of material fact as to deficiency and prejudice. Rather, the court erroneously concluded that the Supreme Court had decided deficiency and prejudice in its majority opinion finding no fundamental error in the prosecutorial misconduct. But the question of whether the prosecutorial misconduct was fundamental error is a different question than the questions of whether defense counsel was deficient in not objecting to the misconduct or whether that deficiency was prejudicial.

Res judicata does not apply because the issue before the appellate court was not the issue in post-conviction. *Res judicata* includes both issue preclusion and claim preclusion. To establish issue preclusion, the party asserting *res judicata* must establish five factors: (1) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the

issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. To establish claim preclusion, the party asserting *res judicata* must establish three factors: (1) same parties; (2) same claim; and (3) final judgment. *Ticor Title Co. v. Stanion,* 144 Idaho 119, 124, 157 P.3d 613, 618 (2007). As the issue decided in the direct appeal is not identical to the issue in post-conviction, issue preclusion cannot apply to Mr. Severson's ineffective assistance of counsel claim. And, as the claim in the direct appeal, prosecutorial misconduct, is not the same as the claim in post-conviction, ineffective assistance of counsel, claim preclusion cannot apply. *Id.* Therefore, summary dismissal on the grounds of *res judicata* was erroneous.

Nonetheless, because the appellate court exercises free review of the district court's application of the relevant law to the facts, *Schultz, supra,* this Court is not constrained by the district court's erroneous application of *res judicata* to Mr. Severson's post-conviction claim of ineffective assistance of counsel. Rather, in this appeal, this Court examines whether Mr. Severson's admissible evidence asserts facts which, if true, would entitle him to relief. If so, the order summarily dismissing the claim of ineffective assistance of counsel must be reversed. *Id.*

This examination requires a review of both the trial record and the Supreme Court's opinion on direct appeal.

The State's evidence in this case was all circumstantial. No witness could testify that he

or she saw Mr. Severson tamper with Mrs. Severson's Hydroxycut capsules.[3] Likewise, no witness could testify as to how Mrs. Severson died. *State v. Severson,* 147 Idaho at 700-701, 215 P.3d at 420-421; Trial Tr.

Instead of direct evidence, the State presented nearly seventeen days of circumstantial evidence. This included evidence that the Seversons were having marital problems and as a result Mrs. Severson moved to Colorado for a time and Mr. Severson had an affair with a significantly younger woman. *Id.* The jury heard many details of the affair, including vulgar remarks about the young woman attributed to Mr. Severson, details of Mr. Severson taking the young woman to a bed and breakfast inn and then allowing her to redecorate portions of Mrs. Severson's home (while Mrs. Severson remained the owner of the home and remained the wife of Mr. Severson) to resemble the inn, allegations of Mr. Severson telling the young woman that he was divorced when he was not, evidence that Mr. Severson bought the young woman an engagement ring with Mrs. Severson's credit card (using the young woman to deceive the store so as to make the purchase without Mrs. Severson's knowledge), evidence that Mr. Severson opened bank accounts with the young woman while still married to Mrs. Severson, and evidence that Mr. Severson made wedding plans with the young woman while still married to Mrs. Severson. Trial Tr. Vol. 3, p. 1645, ln. 2-8; p. 1659, ln. 3-7; Vol. 7, p. 2833, ln. 3-13; p. 2901, ln.

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[3] Hydroxycut is a dietary supplement. www.hydroxycut.com accessed November 25, 2013. Mr. Severson was charged with poisoning food and/or medicine in violation of I.C. § 18-5501. Trial CR Vol. I, p. 17. The statute does not define either food nor medicine. However, the federal government treats dietary supplements as a unique category which is neither food nor drugs. See Dietary Supplement Health and Education Act of 1994. *See NVE, Inc. v. Department of Health and Human Services,* 436 F.3d 182, 186 (3rd Cir. 2006), noting "[The] DSHEA provided substantive and procedural limits on the FDA's ability to restrict the use of dietary supplements. DSHEA identified the limited alternative conditions under which a dietary supplement or food containing a dietary supplement could be deemed adulterated."

7-p. 2904, ln. 7; p. 2979, ln. 25-p. 2294, ln. 6; p. 3139, ln. 4-p. 3142, ln. 2; p. 3199, ln.15-p. 3201, ln. 18; p. 3347, ln. 14-p. 3349, ln. 4; p. 3358, ln. 8-21; p. 3525, ln. 19-p. 3535, ln. 15; p. 3537, ln. 8-p. 3557, ln. 4. The State also presented evidence that Mrs. Severson threatened to deny Mr. Severson a divorce and/or to make it very expensive for him to divorce her. Trial Tr. Vol. 3, p. 1649, ln. 22-p. 1651, ln. 5; Vol. 3, p. 1931, ln. 11-16. The State also presented evidence that Mr. Severson engaged in stalking-like behavior toward the young woman when the affair ended and evidence of him engaging in other affairs shortly after Mrs. Severson died, wherein again, at least with one woman, he engaged in arguably socially inappropriate behavior after the relationship terminated. Trial Tr. Vol. 6, p. 3557, ln. 22-p. 3562, ln. 2; p. 3586, ln. 8-p. 3596, ln. 21.

The State also presented evidence that in December 2001, Mrs. Severson bought Hydroxycut capsules and that after taking them she began suffering the effects of an ulcer. Trial Tr. Vol. 4, p. 2230, ln. 7-p. 2235, ln. 18. The State presented evidence that Mrs. Severson said that the capsules looked discolored and were warm to the touch. Trial Tr. Vol. 3, p. 1932, ln. 19-p. 1933, ln. 7. The State also presented evidence that Mr. Severson and his son attempted to find out what was wrong with the capsules, engaging an attorney and contacting the State and the FDA in a search for answers. Trial Tr. Vol. 4, p. 1966, ln. 1-p 2062, ln. 16; Vol. 5, p. 2296, ln. 8-p. 2297, ln. 13; p. 2336, ln. 6-15. Ultimately, an FDA chemist determined that the capsules had a substance similar to Drano in them, but further determined that no one could definitely say it was Drano. Trial Tr. Vol. 4, p. 2110, ln. 11-19; p. 2147, ln. 9-19. Nor could the chemist determine who had put the substance into the capsules. Trial Tr. Vol. 4, p. 2157, ln. 4-6.

The defense expert testified that there was nothing in the autopsy or an endoscopy

performed on Mrs. Severson to diagnose the ulcer that was consistent with ingesting a caustic agent like Drano. Trial Tr. Vol. 7, p. 3038, ln. 18-p. 3040, ln. 12.

The State presented evidence that Mr. Severson was very upset over Mrs. Severson's ulcer and presented a witness who testified that Mr. Severson told him that the doctor said that Mrs. Severson was dying of cancer. Trial Tr. Vol. 5, p. 2542, ln. 8-p. 2544, ln. 9; Vol. 7, p. 2909, ln. 1-p. 2911, ln. 15.

According to the State's evidence, on February 14, 2002, Mr. Severson picked up Mrs. Severson's Ambien prescription at Wal-Mart. Trial Tr. Vol 5, p. 2801, ln. 1-25. Then the Seversons went out to dinner. The next morning at 3:00 a.m., Mr. Severson called his son and daughter-in-law, extremely upset and distraught, because he had discovered Mrs. Severson on the living room couch not breathing. Trial Tr. Vol. 2, p. 981, ln. 19-21; p. 1163, ln. 5-25. The son and daughter-in-law rushed to the Severson house and called 911. Trial Tr. p. 1164, ln. 24-p. 1169, ln. 17. The son performed CPR until paramedics arrived. Trial Tr. p. 1169, ln. 25-p. 1172, ln. 9. Mr. Severson stood nearby crying. Trial Tr. Vol. 2, p. 1009, ln. 19-23. However, despite three repeat efforts to intubate, hampered by the fact that Mrs. Severson vomited during the paramedics' efforts and vomitus got into her mouth and airway, Mrs. Severson could not be revived. Trial Tr. Vol. 2, p. 1015, ln. 19-25; p. 1017, ln. 5-9; p. 1087, ln. 14-23.

At the hospital, Mr. Severson told the emergency room doctor that Mrs. Severson had been suffering from ulcers and sleep apnea. Mr. Severson also said that Mrs. Severson had stopped breathing in the past in her sleep, but that he had always been able to wake her and then she would begin breathing again. Trial Tr. Vol. 2, p. 1091, ln. 1-9. The doctor testified that not many medical conditions cause people to stop breathing and then start again as Mr. Severson

described. Trial Tr. Vol. 2, p. 1098, ln. 2-13.

An autopsy showed that Mrs. Severson had taken both Ambien and Unisom prior to her death. Trial Tr. Vol. 2, p. 1279, ln. 14-16. The amount of Ambien she had taken was not a potentially lethal amount. Trial Tr. Vol. 2, p. 1287, ln. 6- 21; Vol. 3, p. 1813, ln. 1-p. 1814, ln. 21. The amount of Unisom she had taken was just barely above the minimum toxic or potentially lethal limit. Trial Tr. Vol. 2, p. 1286, ln. 11-p. 1287, ln. 5; Vol. 3, p. 1806, ln. 1-p. 1808, ln. 22. Neither Ambien nor Unisom is known to cause death on its own. However, according to the doctor who performed the autopsy and the State's expert, it was possible that the two medications taken together had a synergistic effect. Trial Tr. Vol. 2, p. 1290, ln. 1-8; p. 1318, ln. 5-17; Vol. 3, p. 1819, ln. 17-p. 1820, ln. 25; p. 1831, ln. 11-15.

The coroner noted a cut on Mrs. Severson's mouth and slight bruising on her lips and chin. Trial Tr. Vol. 2, p. 1304, ln. 21-p. 1308, ln. 14. The State's experts testified that this was consistent with her being smothered; however, they did not explain why the bruising was limited to the lips and chin and did not include the nose, which would have to have been subjected to pressure in the event of smothering. Trial Tr. Vol. 2, p. 1320, ln. 8-11; Trial Tr. Vol. 7, p. 3081, ln. 19-p. 3082, ln. 8. The emergency room doctor, the defense expert, and the mortician who prepared Mrs. Severson's body for the funeral testified that the cut and bruising were consistent with CPR efforts, which included three insertions of the laryngoscope into Mrs. Severson's mouth, and consistent with injuries seen in other deaths wherein CPR had been unsuccessful. Trial Tr. Vol. 2, p. 1118, ln. 2-p. 1120, ln. 13; Vol. 6, p. 3022, ln. 21-p. 3023, ln. 23; Vol. 7, p. 3882, ln. 17-p. 3883, ln. 4.

Ultimately, the coroner and the State's experts all concluded that they could not

determine a cause of death. Trial Tr. Vol. 2, p. 1324, ln. 23-p. 1325, ln. 7.

The jury also heard evidence that the day after Mrs. Severson died, her mother told Mr. Severson that her life insurance policy did not name him as a beneficiary and he appeared to be shocked. Trial Tr. Vol. 3, p. 1943, ln. 1-14.

The State collected various foods from the Severson home, but none were found to contain either Ambien or Unisom. Trial Tr. Vol. 2, p. 1415, ln. 22-p. 1416, ln. 13.

The district court stated its conclusion both that the evidence was sufficient to deny a Rule 29 motion, and that it was also possible that the jury could acquit. However, the jury concluded that Mr. Severson was guilty. Trial Tr. Vol. 6, p. 3647, ln. 7-p. 3648, ln. 1.

Significant prosecutorial misconduct occurred in the State's closing argument. In his dissent from the Supreme Court's decision affirming the convictions and sentence, Justice W. Jones set out the misconduct verbatim. He wrote:

> The prosecutor made the following remarks in regard to Severson's right to remain silent:
>
> > We are talking about science here; and [the defense attorney's] note—that he tore down—said, "[t]heory versus fact." Well, in the real life in this courtroom, the great leveler of society in here, theory and fact do work together.
> >
> > It is not a balloon, where one little microscopic pin breaks the whole balloon. This is a circumstantial case, *because nobody was in that house that night but Mary and Larry. Nobody knows, that has testified, what happened between them.*
> >
> > ....
> >
> > [Mary's] mouth opened easily. *No one else in this courtroom has testified* in front of you, *that was there,* that they injured Mary Severson's face. The only thing that they can tell you, [from expert testimony], is, these injuries [to her mouth] are consistent with

bruising of somebody who could have been smothered.

(Emphasis added). The prosecutor made the following remarks which could have ignited passion and prejudice in the jury by improperly appealing to their emotions:

> [The trip back to Mountain Home in an attempt to rectify the marriage] didn't go over too well. On December 18th, [Mary] came back for Christmas to stay, left her mom's house and came back [to Mountain Home], drove back for Christmas, *her last Christmas with her family.*
>
> ....
>
> The only thing we have got in this case is what the house can tell us of why Mary died, what the business tells us of why Mary died. The Hydroxycut will tell us of why Mary died, and what Mary tells us about why and how she died.
>
> Mary does speak to us today 33 months later. *Mary still speaks to us today. She is still telling us what happened that night and why she is dead.*
>
> ....
>
> During [the time Mary was with her mother in Colorado] the defendant is out gallivanting around with [his girlfriend]. Some people are even saying, 'Oh, I didn't know you had a daughter." "Well, it's my fiance." [Severson] says it's his fiance.
>
> ....
>
> So, Mary gets to come home in October to find that *this 21–year–old tramp* has gone inside her house and painted her guest bathroom.
>
> ....
>
> Yeah, [Mary] had some mild depression. Who wouldn't, after finding out *your husband is screwing some 21–year–old,* having an affair with *some 21–year–old girl,* and you're getting shipped back to Colorado. Who wouldn't be a little depressed about that, as a young woman?

....

Could [somebody else have tampered with the Hydroxycut bottle]? I suppose, in the same way that there are little green aliens could be coming to us from Mars or something. It is possible in one way, shape, or form that that's exactly what somebody did.

....

Mary tells us, *she speaks to us from her grave as to who killed her* and why she died. All of these circumstances tell us that her body left the indelible evidence that [the defense] cannot get past, and nobody can get past.

....

[The defendant's son] didn't see [the bruises on Mary's face prior to administering CPR]. He wasn't doing that much. That's force. That's effort. That's putting your hand, at least plausibly, in somebody's face and *making sure the breath is out of there. And making sure you have done the job right, because by God that woman just won't die.* She's strong; she is the strong one.

....

Please don't hold that fact, that [the other prosecutor misspoke and] may have said [the defendant's girlfriend] was nineteen *instead of the ripe old age of 21.* Or, she still looks like she is about 19.

And I guess all the witnesses say that they saw Larry running around with a girl they thought was his daughter, who was a teenager, who was all of age 18 or 19. That may have been playing in the [other prosecutor's] mind.

....

[The defense attorney] talked a lot about what went on that day, and "[w]e don't' know this, and we don't know that." He is right. I would love to talk to Mary Severson and find out, on the early-morning hours of February 15th, how she was feeling. How did the meal make her feel? How did it feel to go to dinner with her husband, and not be able to order the food you want?

> How many sleeping pills did she take? Why did she take them? If she took them, did she know how many she took?
> I don't get [to] do that. I don't get to ask those questions. Nobody does. All we know is that according to [the State's expert]—I think a very credible individual, with nothing to lose in this matter—gave you a good answer as to how he figured out the total[ ] [number of pills].
>
> ....
>
> We are done: [the defense counsel] and I, and [co-counsel]. Our job here before you is complete. *Innocent until proven guilty, yes. Today ends that preposition.*
>
> There is no innocence in this courtroom except the innocence of Mary Severson. She didn't have to die. The only reason she did was the lust and greed of the defendant to get out of a marriage rather than divorce so he could get all the money and then some; *and he could pursue his other women, not this fat woman that he saw in front of him* who refused to give him the divorce.
>
> You have a difficult decision to make. There's people in this courtroom who have been here the entire time that you have heard from. Mary Severson isn't a body. Mary Severson isn't a picture of bruises. Mary Severson isn't a decedent.
>
> *Mary Severson was the 35–year–old mother of two boys. Mary Severson was the daughter of Carol Diaz. Mary Severson was the sister of Maria Gray.* Mary Severson's life had a purpose, and it had meaning. Your duty today is to give her death justice. Thank you.
>
> (Emphasis added).

I find the prosecutor's comment on Severson's right to remain silent the most egregious and offensive of all the comments made during closing arguments. The comments served no other purpose then to draw attention to the fact that Severson chose to exercise his constitutional right not to testify at his trial. I can see no other purpose in the statement. The majority sweeps the statement under the rug by conclusively finding that the statement is "ambiguous" and a "single isolated comment" over the course of a "seventeen-day trial, [where] there was substantial evidence of Severson's guilt." I do not find the prosecutor's statements as innocent as the majority plays them out to be; further, I find a complete lack of other meanings which a jury may attach to the statement "*nobody was in that house that*

> *night but Mary and Larry [ ] nobody knows, that has testified, what happened between them.*" In context it is clear that the prosecutor was referring to the events that occurred between Mr. and Mrs. Severson on the night of Mrs. Severson's death. The prosecutor then clearly states that based on the fact that only two people were present, and one of them is dead, there is only one other person who has knowledge of the details which unfolded that fateful night, and that person did not testify. The meaning is anything but ambiguous and a blatant violation of Severson's constitutional right to remain silent.

State v. Severson, 147 Idaho 694, 724-26, 215 P.3d 414, 444-46 (2009).

Justice Jones, with *pro tem* Justice Kidwell's agreement, concluded that while there was evidence to support Mr. Severson's conviction, he was not afforded a fair trial and so his conviction should be reversed and the case remanded for a new trial. 147 Idaho at 729, 215 P.3d at 449.

Mr. Severson's petition for post-conviction relief raised a genuine issue of material fact as to whether the failure to object to this misconduct was deficient performance. *Strickland, supra.* Allowing misconduct to carry on without objection so far that the trial becomes unfair, at least in the opinion of two Supreme Court justices, is not objectively reasonable performance nor can it be justified as strategic. *McKay v. State,* 148 Idaho 567, 571, 225 P.3d 700, 705 (2010) (trial counsel's error which resulted in a violation of client's due process rights and right to a jury trial was objectively unreasonable as there was no conceivable tactical justification for decision not to object to an erroneous instruction). Even if counsel was hesitant to raise an objection that would result in a mistrial because they believed that the State could not obtain a guilty verdict given the weaknesses of its case, counsel could have asked the district court to excuse the jury when the misconduct first began and raised an objection - which either would have been granted and thus would have acted to stop further misconduct or would have at least preserved the error

for appellate review so that Mr. Severson would have only had to demonstrate prosecutorial misconduct on appeal, not fundamental error. *State v. Severson,* 147 Idaho at 720, 215 P.3d at 440. There could not be a strategic reason to sit silent.

Likewise, Mr. Severson's petition raised a genuine issue of material fact as to prejudice. *Strickland, supra.* As discussed above, the State's case was all based upon circumstantial evidence. No one could testify that Mr. Severson had tampered with the Hydroxcut capsules. And, in fact, the jury heard expert testimony that Mrs. Severson's body showed no indication of ingestion of a caustic substance. Similarly, no one could establish how Mrs. Severson died. The State presented testimony that she could have died from an overdose of sleeping pills. But, it presented no evidence that Mr. Severson caused the overdose. The State also presented testimony that Mrs. Severson had injuries consistent with its theory of smothering - but, the jury also heard ample evidence, both from the State's witness, the emergency room doctor, and defense witnesses, that the injuries observed were consistent with the failed CPR efforts.

Even considering the majority opinion in the direct appeal, that the prosecutor's misconduct did not rise to the level of fundamental error, Mr. Severson established a genuine issue of material fact regarding prejudice. In the direct appeal, the Supreme Court was concerned with the question of whether the prosecutorial misconduct was fundamental error. The Court never considered the question raised in post-conviction of whether there is a reasonable probability of a different result had the deficient performance not occurred. *State v. Severson,* 147 Idaho at 720, 215 P.3d at 440.

As the district court noted at the time of the Rule 29 motion, given the case the State presented, the jury could have acquitted. Mr. Severson did raise a genuine issue of material fact

as to whether there was a reasonable probability of a different outcome had counsel not allowed the prosecutorial misconduct to go unchecked and unpreserved as an appellate issue. *Strickland, supra.* Mr. Severson raised the reasonable probability that the jury could have acquitted if an objection had stopped the misconduct or in the alternative that he would have had a different outcome on appeal had he not been held to the fundamental error standard of review. *Id.*

As Mr. Severson did raise genuine issues of material fact both as to deficiency and as to prejudice, summary dismissal of his claim of ineffective assistance of counsel was improper. *Schultz, supra.* Therefore, this Court should reverse the order of partial summary dismissal and remand for further proceedings.

V. CONCLUSION

For the reasons set forth above, Mr. Severson respectfully requests that this Court reverse the order of partial summary dismissal and remand for further proceedings.

DATED this 7th day of January, 2014.

Dennis Benjamin

Deborah Whipple
Attorneys for Larry Severson

CERTIFICATE OF SERVICE

I CERTIFY that on January 7, 2014, I caused two true and correct copies of the foregoing document to be:

__X__ mailed

___ hand delivered

___ faxed

to: Idaho State Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple